

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, DC 20530

June 5, 2000

David Méndez, Esq.
Bickerstaff, Heath, Smiley, Pollan, Kever & McDaniel
1700 Frost Bank Plaza
816 Congress Avenue
Austin, Texas 78701-2443

Dear Mr. Méndez:

This refers to the adoption of numbered posts for the Sealy Independent School District in Austin County, Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your response to our February 14, 2000, request for additional information on April 6 and June 1, 2000; supplemental information from the state was received on June 2, 2000.

We have carefully considered the information you have provided, as well as Census data, information in our files, and information and comments from other interested parties. According to the 1990 Census, 12.7 percent of the school district's total population is black and 15.9 percent is Hispanic. Since 1990, it appears that the school district has experienced growth in its overall population and in the minority share of its population. Minority students within the school district at present constitute a significant percentage of the school district's overall student enrollment (28 percent Hispanic/16 percent black).

Under the existing system, the school district elects its seven-member board of trustees on an at-large basis to three-year staggered terms of office (3-2-2). Only one minority representative, an African American, has been elected to the school board in recent times. After two unsuccessful efforts, this individual succeeded in gaining election when she ran for office in an election year when three trustee seats were up for election. In that contest in 1992 she placed last among the three winning candidates, which was also true of her reelection in 1995. In her two unsuccessful bids for the school board, she, like other minority candidates, appears to have failed to garner sufficient white voter support to get elected under the at-large system.

In our view, the available information concerning voting patterns within the school district is not inconsistent with a pattern of racially polarized voting, although it does appear that some minority

candidates in the school district and other local elections have received a level of support from white voters, as well as from minority voters, sufficient to gain election. By and large, however, this level of white voter support appears to have been reserved for a very small number of minority candidates. Most minority candidates have been unsuccessful in election contests for at-large seats on the school board, as well as for other local offices when they face white opposition. Electoral patterns such as these are typically observed in instances where voting is racially polarized.

The school district now seeks to add to its at-large electoral system a numbered post requirement that, in effect, will convert each election for a seat on the board into a separate election contest. In these separate contests for school board seats, minority-supported candidates are more likely to be pitted against white incumbents or challengers in "head-to-head" contests. Where voting is racially polarized, our experience suggests that minority-supported candidates are more likely to lose because they are unlikely to garner a majority of the votes in the bid for a single seat. Indeed, it appears that the school district's sole minority trustee may not have fared well under the proposed system, given her third place showing in the two successful bids for the board in which she faced white opposition.

The school district maintains, however, that the proposed numbered post requirement will not have a negative impact on minority electoral opportunity for at least three reasons. First, the district asserts that voting within the district is not racially polarized and numbered posts cannot adversely impact minority voters under these circumstances. Second, the district claims that minority voters will not be harmed by the implementation of numbered posts because they do not make use of the technique of "single-shot" voting under the existing system and are too small a share of the voting population to elect on their own a candidate of choice. Hence, the change to numbered posts could not worsen their political participation opportunities. Third, the district posits that the addition of numbered posts will not harm minority voters because under the proposed system, unlike the existing system, white voters will not be able to utilize the technique of "single-shot" voting, which denies minority candidates the white votes needed to gain election under the at-large system.

With regard to the district's first assertion concerning the existence of polarized voting, we have noted above that based on the information available to us there is evidence of such a pattern of voting. We have been unable, however, to conduct a more particularized analysis of the school district's claim in this regard, given, among other things, several deficiencies in the information that has been provided. For example, election returns by voting precinct for school district contests in which minority candidates participated were not provided to us, except for the May 2000 election returns forwarded to us on June 1, 2000. And, the consolidated returns that were provided did not include in several instances the total number of voters who voted in a particular school district election, all of which is important information in the analysis of voting behavior. Finally, no information was provided for elections in which minority candidates participated for municipal offices other than for the City of Sealy.

In support of its argument regarding the absence of polarized voting, the school district relies in large part on the following elections involving minority candidates: 1) the election without opposition of a minority candidate who was first appointed to fill a vacant constable position in Precinct 4 (this candidate also happens to be the husband of the minority school board trustee); 2) the third place election and

reelection of the incumbent African-American trustee, who is the only minority to ever serve on the school board; and 3) the election of a single minority candidate to the five-member city council for the City of Sealy, despite numerous unsuccessful candidacies of minority candidates in a city with a combined 1990 minority population share of 38 percent. We are not persuaded that these limited instances of minority electoral success under the circumstances noted above demonstrate the absence of polarized voting within the school district, given the lack of success generally experienced by minority candidates.

The school district's second claim is that the proposed change will not harm minority-supported candidates because minority voters do not single-shot vote and, by themselves, are too small a share of the voting population to control the outcome of an at-large election. This reasoning, however, does not fully embrace the level of minority electoral success, albeit limited, that has been achieved to date within the school district. While it does appear that under the existing at-large, staggered term election system there are limited opportunities for the effective use of single-shot voting, a candidate apparently preferred by the minority community has gained election to the school board with significant crossover from white voters. This minority candidate ran successfully only in years in which there were three seats up for election and, even then, placed last among the winning candidates when there was white opposition. As noted earlier, it is questionable whether this minority candidate, the incumbent African-American trustee, could continue under the proposed system to be elected to the school board because she would have to place first in contests in which there was white opposition.

Finally, as we understand it, the school district's third claim is that the proposed change may actually benefit minority voters by ensuring that white voters will not be able to "single-shot" vote for a white candidate and thereby deny minority candidates the white votes they need in order to win election. Our experience analysing the impact of electoral devices such as the proposed numbered posts requirement does not support this conclusion. It is true that the implementation of numbered posts will prevent any use of the technique of "single-shot" voting. In our experience, however, "single-shot" voting is generally utilized by minority voters to boost the effect of their support for a preferred candidate in multi-seat, at-large election contests where voting is racially polarized, rather than by white voters who are a majority of the electorate; no information provided to us during our review of the instant submission would require a different conclusion. Implicit in this claim by the school district, however, is the view that when white voters limit their vote to a single candidate, they are more likely to choose a white rather than a minority candidate. This observation is consistent with our experience and adds to the evidence indicating that in single-seat contests for the school board, minority-supported candidates are unlikely to place first ahead of white candidates, and, indeed, are in a worse position than under the existing at-large system to elect candidates of their choice.

Under these circumstances, I am unable to conclude as I must under Section 5 that the school district has met its burden of demonstrating that the submitted change has neither a discriminatory purpose nor a discriminatory effect. Georgia v. United States, 411 U.S. 526 (1973); see also the Procedures for the Administration of Section 5 (28 C.F.R. 51.52). Therefore, on behalf of the Attorney General, I must object to the addition of numbered posts for the Sealy Independent School District.

We note that under Section 5 you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed change neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. See 28 C.F.R. 51.44. In addition, you may request that the Attorney General reconsider the objection. See 28 C.F.R. 51.45. However, until the objection is withdrawn or a judgment from the District of Columbia Court is obtained, the use of numbered posts by the school district continues to be legally unenforceable. Clark v. Roemer, 500 U.S. 646 (1991); 28 C.F.R. 51.10.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the Sealy Independent School District plans to take concerning this matter. If you have any questions, you should call Deanne B. Ross (202-514-6331), an attorney in the Voting Section.

Sincerely,

Bill Lann Lee
Acting Assistant Attorney General
Civil Rights Division